

YIU POH SIONG

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v.

PP

HIGH COURT SABAH & SARAWAK, SIBU

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HAMID SULTAN ABU BACKER JC

[CRIMINAL APPEAL NO: 42-4-2007]

13 NOVEMBER 2007

ROAD TRAFFIC: *Overloading - Carrying on lorry load in excess of permitted weight - Offence under r. 18 Road Traffic Rules 1959 (LN 166/1959) - Offender convicted and sentenced under s. 214 Penal Code for bribing officer to conceal offence under r. 18 - Whether r. 18 read together with s. 128(1) Road Transport Act 1987 a compoundable offence - Whether s. 214 excludes compoundable offences - Whether conviction and sentence under s. 214 rendered illegal*

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CRIMINAL LAW: *Penal Code - Section 214 - Offence of giving gratification to conceal offence under r. 18 Road Traffic Rules 1959 (LN 166/1959) - Whether r. 18 read together with s. 128(1) Road Transport Act 1987 a compoundable offence - Whether s. 214 excludes compoundable offences - Whether conviction and sentence under s. 214 rendered illegal*

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The appellant herein was originally charged under s. 11(b) of the Anti-Corruption Act 1997 punishable under s. 16 of the same Act for an offence under r. 18 of the Road Traffic Rules 1959 (LN 166/1959) ('Rules'). The appellant was found to have corruptly given gratification in the sum of RM50 to a corporal officer to refrain from taking an action against him for carrying excessive pebble stones on his lorry contrary to r. 18 of the Rules. After the commencement of the trial the accused pleaded guilty to an alternative charge under s. 214 of the Penal Code ('Code') which carried a lesser punishment than the original charge. The appellant now appealed against the sentence of 1 1/2 months' imprisonment imposed by the sessions court judge.

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Held (acquitting and discharging the appellant):

(1) The motive in giving gratification is very material and that motive must be to compromise an offence that is not compoundable. In the present case, the parties did not address the court as to whether an offence under r. 18 of the Rules read together with s. 128(1) of the Road Transport Act 1987 was compoundable. Section 120 of the Road Transport

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- A Act 1987 stated that it was a compoundable offence. However, s. 214 of the Code did not apply to compoundable offences. Therefore, notwithstanding the submission of parties and the fact that this issue was not raised herein, the conviction and sentence were rendered illegal.
- B **Case(s) referred to:**
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC (*refd*)
Hossain (M) v. PP [2008] 7 CLJ 560 HC (*refd*)
Joginder Singh v. PP [1983] 1 LNS 63 HC (*refd*)
Leken Gerik (M) v. PP [2007] 8 CLJ 158 HC (*refd*)
- C *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421 FC (*refd*)
PP v. Erwin Hardy & Anor [2007] 9 CLJ 334 HC (*refd*)
PP v. Idris [1955] 1 LNS 93 HC (*refd*)
PP v. Mohammad Arfah Jasmi [2008] 7 CLJ 836 HC (*refd*)
PP v. Peter Kong [2007] 1 LNS 412 (*refd*)
- D *PP v. Sim Kay Chay* [2008] 1 CLJ 838 HC (*refd*)
- Legislation referred to:**
Anti-Corruption Act 1997, s. 11(b)
Criminal Procedure Code, s. 294
Dangerous Drugs Ordinance 1952, s. 12(2)
- E Penal Code, s. 214
Road Traffic Rules 1959 (LN 166/1959), r. 18
Road Transport Act 1987, ss. 120, 128(1)
- F *For the appellant - Paul YC Liong; M/s Liong & Advoc*
For the respondent - Ahmad Zubir Jantan DPP; AG's Chambers Sarawak
Reported by Usha Thiagarajah

JUDGMENT

- G **Hamid Sultan Abu Backer JC:**
- H [1] This is my judgment in respect of the appellant's appeal against sentence of imprisonment of 1 1/2 months imposed by learned Sessions Judge dated 21 May 2002 upon the appellant pleading guilty to an alternative charge under s. 214 of the Penal Code.
- I [2] The appellant has pleaded guilty based on the fact that he had given gratification in the sum of RM50 to Corporal R/F 113813 Halil bin Ali Basah attached to the Traffic Section of Mukah Police Headquarter, in consideration of the said Corporal

concealing the offence of carrying excessive pebbles stones load on the lorry SD 7017Q, an offence under Rule No. 18 of the Road Traffic Rules 1959 (LN 166/1959).

[3] The charge in the original form reads as follows:

Charge

That you, on the 24th February 2005, at about 9.40 a.m., at Jalan Kubu II, Mukah, in the District of Mukah, in the Mukah Division, in the State of Sarawak, did corruptly give a gratification of RM 50.00 cash, to an agent of the Government of Malaysia, namely, Corporal RF 113813 Halil bin Ali Basah of the Royal Malaysian Police, attached to the Traffic Section of Mukah Police Headquarter, as an inducement for forbearing to do an act in relation to his principal's affairs, to wit, to refrain from taking action against you, for an alleged traffic offence under Rule No: 18 of the Road Traffic Rules 1959 (L.N. 166/59), and that you have thereby committed an offence under Section 11(b) Anti Corruption Act 1997 and punishable under Section 16 of the same Act.

Alternative Charge

That you, on 24.2.2005, at about 9.40 a.m., at Jalan Kubu II, Mukah, in the District of Mukah, in the Mukah Division, in the State of Sarawak, gave a gratification, to wit, cash RM50.00 to one Corporal RF 113813 Halil bin Ali Basah R/F 113813 attached to the Traffic Section of Mukah Police Headquarter, in consideration of the said Corporal R/F 113813 Halil Bin Ali Basah, concealing the offence of carrying excessive pebbles stones load on the lorry SD 7017Q, an offence under Rule No. 18 of the Road Traffic Rules 1959 (LN 166/1959) read together with Section 128(1) of Road Transport Act 1987 (Act 333), and which offence is punishable with a fine not exceeding RM2000.00 or imprisonment for a term not exceeding 6 months, and that you have thereby committed an offence punishable under Section 214 of the Penal Code (Act 574).

[4] It must be noted here that after the commencement of trial the accused was offered an alternative charge under s. 214 of the Penal Code *in lieu* of the original charge under s. 11(b) of the Anti-Corruption Act 1997 (hereinafter called the 'ACA') which carried a lesser punishment when compared to the original charge.

- A [5] The memorandum of appeal *inter alia* reads as follows:
- (i) that the Learned Sessions Court Judge has addressed her mind inadequately on the Accused's character, age, health, antecedents before imposing the sentence;
- B (ii) that the Learned Sessions Court Judge has addressed her mind inadequately on the extenuating circumstances of how the offence has been committed by the Accused as disclosed in the Accused's caution statement dated 24th February, 2005 (Exhibit D1) before imposing the sentence;
- C (iii) that in all event, the sentence was severe and/or otherwise manifestly excessive as there was a failure on the part of the Learned Sessions Court Judge to apply the right sentencing principle in view of the circumstances of the case.
- D [6] In crux, the learned counsel for the appellant says that s. 214 is a petty offence. The court ought to have considered s. 294 so as to suspend the sentence imposed and bound the accused over with a good behaviour bond without serving the custodial sentence or alternatively ought to have imposed a fine on the facts of this case.
- E [7] The learned DPP vehemently objects to the submission of the appellant and says:
- (i) the appellate court should not interfere with the punishment imposed by the trial court and relies on the case of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139 and *Joginder Singh v. Public Prosecutor* [1983] 1 LNS 63.
- F (ii) there is nothing in the facts showing that the appellant falls under the criteria of s. 294 of CPC and relies on the case of *PP v. Idris* [1955] 1 LNS 93 where Thomson J held that s. 294 could only be applied to offences punishable with imprisonment only. Further the learned DPP relies on the case of *PP v. Loo Choon Fatt* where Hashim Yeop Sani J (as he then was) held: "It would seem to me quite clear that on the terms of s. 294 of the Criminal Procedure Code the discretion to order a bond under that section cannot be applied to an offence under s. 12(2) of the Dangerous Drugs Ordinance 1952 because there is an alternative punishment of either a fine or imprisonment provided in that section." And conclude by saying that since s. 214 of the Penal Code provides for alternative punishment of either fine or imprisonment, the court should not invoke s. 294 on the appellant.
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[8] Further, the learned DPP says corruption is a serious crime and the custodial sentence must not be disturbed and relies heavily on the Federal Court decision of *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421 where it was stated:

Any offence, be it murder, rape, robbery or corruption is viewed as an offence against society and the community at large. By stating that the crime of corruption stands in a league of its own and cannot be equated with the heinous crimes of murder, rape, robbery and criminal breach of trust, etc the Court of Appeal has certainly underplayed the effect of corruption in this society. The offence of corruption, if unabated, is far more reaching in consequences than crimes of robbery, criminal breach of trust or rape. Therefore, the sentence imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences.

[9] To determine the fate of this appeal as per memorandum of appeal the real issues which I have to determine is that whether s. 214 of the Penal Code *per se* can be said to be a grave and serious offence which warrants custodial sentence. If not whether a fine or an order under s. 294 of the CPC would have been proper exercise of discretion on the facts of this case. There is also another issue of law relating to the legality of the charge which I will deal at the end of the judgment.

The Law

[10] I have dealt with the law on sentencing principles in many of judgments to name a few, they are as follows (i) *Leken Gerik (M) v. PP* [2007] 8 CLJ 158, (ii) *PP v. Sim Kay Chay* [2008] 1 CLJ 838, (iii) *PP v. Erwin Hardy & Anor* [2007] 9 CLJ 334 and (iv) *PP v. Peter Kong* [2007] 1 LNS 412. I do not wish to repeat the same here except to highlight some parts of the judgment which will be proper to adopt on the facts of the case. In *Leken Gerik (M) v. PP* [2007] 8 CLJ 158 the criteria which the court must consider before imposing sentence was set out and this included the following: gravity or severity of facts constituting the offence; circumstances of which it was committed; rampancy of such offence in the area; offender's previous record; offender's contribution and support to his family; offenders means; effect of conviction on his job opportunities; age and health of accused; whether 1st offender; whether accused PG; whether accused cooperated with police after commission of offences; status of accused.

- A Failure to consider at the above principles in totality and only consideration of public interest to mete out the harshest punishment alone will only amount to an expression of emotion alienating the decision from legal jurisprudence and judicial consideration. In consequences, the sentence will not be according to law.
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- (i) In *Hossain (M) v. PP* [2008] 7 CLJ 560 the principles relating to imposition of fine order/or imprisonment was considered and it was sated:
- C I will say that if parliament deems it fit that it may be fine or imprisonment or both, the court has a duty to consider first a fine for 1st offenders and not imprisonment. However, if imprisonment is intended to be imposed, the court must state its ground why fine was not imposed in particular. Courts do not have a general power to act arbitrarily on issues of sentencing in a manner to make the provisions of fine otiose and award imprisonment to 1st offenders when that is not the intention of parliament. Further, such imprisonment may also affect public purse and may be a relevant consideration to be taken into account, when parliament says fine (deterrence plus revenue) or imprisonment (deterrence plus liability to public). The question of revenue and liability to the public must be balanced on the whole in public interest to ensure such offences are deterred.
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- F Further it was stated:
- Any sentence, in particular fine, when imposed must be reflective of the nature and seriousness of the offence, the character and conduct of the accused, the degree of *mens rea*, and the financial means of the accused. It is a cardinal rule that fine should not be excessive and should not leave an impression with the accused that he is being persecuted. The imposition of a small fine on a rich and influential person or of a heavy fine on a man who has no means is not justified. If the offence is not of a gravity to justify imprisonment, the offender should not lose his liberty merely because he is too poor to pay a substantial fine. Where the offence allows for a fine or imprisonment or both, it is lawful to combine a fine and imprisonment.
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- I (ii) In *PP v. Mohammad Arfah Jasmi* [2008] 7 CLJ 836, High Court Sabah & Sarawak, Kuching Criminal Appeal No. 42-17-2006-II:

The modern tendency in sentencing, as I understand it, is not to try to fill the jails at every conceivable opportunity, but only to send people to prison where this is essential in the interest of society. I certainly do not regard it as in the interest of society to send people previously of good character, particularly young people, to prison when there are other adequate means of dealing with them.

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Corruption

[11] In my view to determine whether the relevant punishable provision of petty offence as opposed to more serious offences in relation to act of corruption must be analyzed and distinguished to achieve fair sentencing policy and measure. The word “corruption” is a generic term within the provisions of various Act of Parliament dealing with the act of corruption and related matters and some act of corruption which are punishable under the act will not fall within the ordinary meaning of corruption. It is not necessary for me to deal with the meaning of corruption save as to say that s. 214 of the Penal Code itself classifies different categories of severeness in corrupt acts which is punishable under the law. Section 214 of the Penal Code reads as follows:

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Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person’s concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

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Exception – The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.

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- A It must be emphasized that the section itself classify the gravity of the offence into 3 types and it has to be ascertained from the sentencing provision of the Act which the accused is alleged to have given illegal gratification in consideration of concealing or screening the offender from legal punishment. The motive in giving
- B gratification is very material and that motive must be to compromise an offence **which is not compoundable** (emphasis added).

Section 214 Of Penal Code Does Not Apply To Compoundable Offence

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[12] Both parties did not address me as to whether an offence under Rule No. 18 of the Road Traffic Rules 1959 (LN 166/1959) read together with s. 128(1) of the Road Transport Act 1987 (RTA 1987) is compoundable. I have looked at the relevant

D statutes in particular s. 120 RTA 1987 which state it is compoundable. That section reads as follows:

- E A Chief Police Officer, a Commissioner of Police or any police officer not below the rank of Inspector specially authorized in writing by name or by office in that behalf by the Minister charged with the responsibility for the police, the Director General or Director or any road transport officer specially authorized in writing by name or by office in that behalf by the Director General, the Dato Bandar, the Perbadanan Putrajaya, the Director
- F General of Highway Authority Malaysia or any officer specially authorized in writing by name or office in that behalf by the Director General of Highway Authority Malaysia, an officer of the appropriate authority specially authorized in writing by name or by office in that behalf by the Minister charged with the responsibility for local government, may in his discretion compound any such
- G offence against this Act as may be prescribed as an offence which may be compounded by such officer or in the case of an officer mentioned in paragraph (d) or (e) any offence against any order or rules made by the appropriate authority under Part III, by collecting from the person reasonably suspected of having committed the same a sum of money not exceeding three hundred
- H ringgit.

- (2) The Minister may make rules to prescribe the offences which may be compounded and the method and procedure therefore.

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- (3) In this section “appropriate authority” means the local authority declared to be an appropriate authority under paragraph (a), or the local authority specified in paragraph (b), of the definition of “appropriate authority” in section 67.

It is clear that s. 214 excludes compoundable offence. Notwithstanding the submission of parties and the fact that this issue was not raised it is my judgment that the conviction and sentence is illegal. In consequence, I set aside the order of learned Sessions Judge dated 21 May 2007 and acquit and discharge the accused for the offence charged. I hereby order so.

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